United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2090

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

RICHARD E. KASPEREK

Petitioner-Appellant

vs.

DONALD RUMSFELD, SECRETARY OF DEFENSE and
COMMANDANT, UNITED STATES MARINE CORPS and
CAPTAIN E.D. MILLER

Respondents-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Richard E. Kasperek, Private, United States Marine Corps appeals from an Order of the United States District Court, Western District of New York, the Hon. John T. Curtin, Chief Judge, dismissing Kasperek's petition/complaint in which he seeks a judgment discharging him from the United States Marine Corps.

Kasperek alleged below that he had been induced to enlist in the Marine Corps by certain false statements of the Marine recruiter with whom he dealt, Sgt. Ronald Kopenen*, and that his enlistment contract had been breached by the failure of the Marine Corps to offer him a chance to be assigned to the position he had sought in his conversation with the recruiter and that he had been promised in the rider to the enlistment contract. After receiving briefs and oral argument on the question of the court's jurisdiction, Judge Curtin held a hearing on July 15 and 16, 1976, after which, in an oral opinion, he dismissed the petition/complaint.

On this appeal, Kasperek's claim of fraudulent inducement to enlist has been abandoned and only the breach of contract claim is presented to this Court.

QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction of this case.

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*Misspelled "Kopahan" in the pleadings herein.

2. Whether the District Court should have stayed its hand because Kasperek had not made application to the Board for Correction of Military Records under 10 U.S.C. §1552 or filed a complaint under 10 U.S.C. §938, under the requirement of exhaustion of administrative remedies.

3. Whether Kasperek is entitled to relief from his enlistment contract.

STATUTES AND REGULATIONS INVOLVED

10 U.S.C. §1552:

Correction of military records: claims incident thereto

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid --

(1) to the surviving spouse, heir or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

(3) as otherwise prescribed by the law applicable to that kind of payment.

A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Administrator of Veterans' Affairs.

10 U.S.C. §938:

Any member of the Armed Forces who believes himself wronged by his commanding officer and who upon due application to that commanding officer is refused redress may complain to any superior commissioned officer who shall forward the complaint to any officer exercising general court martial jurisdiction over the officer against whom it is made. The officer exercising general court martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of. And he shall as soon as possible send to the Secretary concerned a true statement of the complaint with the proceedings had thereon.

STATEMENT OF FACTS

Private Richard E. Kasperek, then age 18, enlisted in the United States Marine Corps on March 26, 1975 with a delayed entry date of

September 5, 1975. When he signed the enlistment contract on March 26, 1975, he also signed a rider to that contract, entitled "Statement of Understanding" (Exhibit 12, App. 1). The promises and understandings contained in this document are at the heart of this case. The first paragraph of this rider reads:

> Today I have enlisted in the Marine Corps and have been promised that I will be assigned, after I successfully complete recruit training, to the Ground Subprogram MECHANICAL/ELECTRICAL. I understand that everything on this page applies to me.

The words "Mechanical/Electrical" are typed into a blank on the printed form. The next paragraph includes the following language:

> 1. I understand that I will be given a basic military occupational specialty within the following area which I have initialed.
> ...
> e. (Ground Subprogram Mechanical/Electrical). Either Utilities, Construction, Equipment and Shore Party, Armament Repair, Ammunition and Explosive Ordnance Disposal, Operational Communication, Repair Serv ices, or Motor Transport, whichever the Marine Corps decides.

Private Kasperek's initials appear next to subparagraph (e).*

Exhibit 1 in this case, a booklet entitled: "Occupational

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*The form also includes the language:

(2) I also understand that there are many different jobs in this area, and that the Marine Corps will decide exactly what job in this area in will get. I understand that there is NO GUARANTEE I will get the exact job or duty assignment I want.
...
(4) I understand that I can be taken out of the program for any one of three reasons:
(a) If I do not pass the training course I am assigned to; or
(b) If I am disciplined because of my behavior; or
(c) If I have not told the truth about my education, qualifications or anything else that has to do with whether I am qualified for the program I have signed up for.

Opportunities for Men and Women in the U.S. Marine Corps," purports to explain these terms.* On page 11, under the heading of the "Construction Equipment and Shore Party" occupational field, there appears a list of special jobs. Within that list is the "Bulk Fuel Man." (App. 9)

It is Kasperek's claim in this Court that the above documents, read together as they must be read, create a contractual obligation on the part of the Marine Corps and that that obligation is, at least, to give Kasperek the opportunity to be selected for the "Bulk Fuel" job. Simply, if Kasperek is guaranteed by the "Statement of Understanding" that he will be selected for one of the jobs within the larger category of the Mechanical/Electrical subprogram, he is therefore guaranteed the chance, in the luck of random selection of recruits for these various jobs, to be chosen for one of the jobs in the smaller included category, the bulk fuel job within the "construction, equipment and shore party" occupational field. Captain Thomas Carras, the head of the Buffalo Marine recruiting station, agreed below that the above documents might make it appear that the "bulk fuel" MOS** was in fact within the "Mechanical/Electrical subprogram" (App. 229, 242), and Judge Curtin so concluded

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*There was testimony that Kasperek received such a book (App. 75, 115), that Sgt. Kopenen, who had no specific memory of conversations with Kasperek, ordinarily used such a book to explain job assignment options to potential receuits (App. 202-07, 245-48), and that copies of this booklet were available and freely given out at the Hamburg, New York recruiting office (App. 75, 160, 170-71).

**MOS: Military Occupational Specialty.

(App. 241-3).* But Captain Carras' testimony established (App. 218-19, 226, 242-43) and Judge Curtin found (App. 258) that the "bulk fuel" MOS was in fact not within the "Mechanical/Electrical" subprogram.** Judge Curtin noted in his oral opinion below that the booklet was misleading (App. 264). Appellant here asserts that the above recited facts establish a cause of action in breach of contract, entitling Kasperek to discharge from the Marine Corps.

Testimony of Kasperek (App. 85-86, 116, 117, 118, 120, 121, 153) and of his uncle, Mr. Eugene Widlak (App. 63, 65, 67, 69, 70, 72, 73) established that Kasperek went to the Marine recruiter with the specific intention of signing up for the "bulk fuel" MOS. After an initial conversation with Sgt. Kopenen in September 1974 (at which Mr. Widlak was present) and some additional meetings in the following months, Kasperek telephoned Sgt. Kopenen in late March, 1975, and inquired whether the "bulk fuel" job was still open, and upon Sgt. Kopenen's assurance that it was, agreed to enlist (App. 119-120).***

On September 5, 1975 Kasperek entered upon active duty and thereafter completed boot camp at Parris Island, South Carolina, in early December. At the announcement of job assignments at that time, he was

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*Appellant submits that the plain language of the documents compels that conclusion.

**Sgt. Kopenen testified that he believed that "bulk fuel" was under the "Mechanical/Electrical" subgroup (App. 203-08, 211), and Judge Curtin so found (App. 88-89).

***In the District Court, much of the attention of counsel and the Court was directed to the claim that Kasperek was fraudulently induced to enlist by Sgt. Kopenen's assurances that Kasperek would be guaranteed the specific job of "bulk fuel specialist" and that that job was related to the fueling of airplanes. Judge Curtin held that Kasperek's reliance on such assurances was not, under all the facts and circumstances, reasonable, that finding is not "clearly erroneous", and Appellant does not here challenge it.

disabused of the belief that he was going to be a "bulk fuel" specialist (App. 99, 100).* His initial complaint was brushed off (App. 100, 102) and after several subsequent complaints were ignored, after he was roundly cursed for showing dissatisfaction with his job assignment (App. 105, 106), and after learning of his father's serious illness (App. 106), he left military control and returned to his home in Lackawanna, New York.

On April 25, 1976 Kasperek was arrested by local police in Hamburg, New York for possession of less than 1/4 ounce of marijuana and incarcerated in the Erie County Holding Center in Buffalo, New York. Although able to post the $500 bail set on that offense, his incarceration was continued by reason of a Marine Corps retainer placed upon him. While he was so detained, his father died of cancer on May 5, 1976. That day, the Marine Corps detainer upon Kasperek was lifted after counsel contacted Appellee Captain Miller, who was the officer in charge of the Marine Corps outpost in Buffalo. Captain Miller required Kasperek to report back to him at 8:00 AM May 11, 1976, after his father's funeral, and Captain Miller stated to counsel on May 5, 1976 that he would on May 11, 1976 decide whether Kasperek would be allowed to remain free pending the resolution of the marijuana charge, or whether he would spend the time before his next court appearance in jail. Kasperek reported to Captain Miller at the appointed time and was ordered by him to report back on

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*We do not here argue that this belief was reasonable. Judge Curtin found it, under all the circumstances, to be unreasonable, and we do not challenge that finding. But the testimony is clear, that Kasperek believed he was to get "bulk fuel," and that he was deeply -- if immaturely and self-destructively -- disappointed to learn that he was not to get it.

Friday, May 14 after Kasperek's first scheduled court appearance in Hamburg. Counsel telephoned Captain Miller on May 14 and informed him that the court appearance in Hamburg had been postponed. Captain Miller stated to counsel that Kasperek would still be required to report to him that afternoon, and that he would be taken back to Camp LeJeune, North Carolina, with no assurance that he would be allowed to return to resolve the marijuana charges pending against him. During this short conversation, Captain Miller changed the reporting date and told counsel that Kasperek would be required to report to him between 12:00 Noon and 3:00 P.M. on May 17, 1976.

Counsel again spoke with Captain Miller on the morning of May 17, 1976 and asked Captain Miller what would happen when Kasperek reported to him that afternoon and was told that Captain Miller would at that time decide whether to order Kasperek to travel with him to Camp LeJeune or to have him escorted to Camp LeJeune under armed guard. Counsel also asked Captain Miller what would happen if Kasperek failed to report and was told that Captain Miller would issue a warrant for Kasperek's arrest. This action was filed that afternoon although notice of that filing and of the temporary restraining order did not reach Captain Miller that day. Counsel called Captain Miller on Tuesday morning, May 18, and was informed by Captain Miller that Marine Corps

personnel were already out looking for Kasperek.

The facts in the preceding two paragraphs were before the District Court, and are before this Court, in the verified Petition/Complaint of Kasperek (App. 38) and the affidavit of counsel of June 1, 1976 (App. 45). Appellees submitted no contrary affidavits or other proof, but relied solely on the claim that the above stated facts failed to establish jurisdiction in the District Court.*

On June 15, 1976, Judge Curtin reserved decision on the jurisdictional and exhaustion issues, and ordered the hearing hereon. (App. 53-56)

At the conclusion of the hearing, Judge Curtin, in an oral ruling (App. 252-65), ordered the Petition/Complaint dismissed. The Court found that in light of the several months between the alleged misrepresentation in September 1974 and Kasperek's signing of the enlistment contract in March 1975, no reliance on the misrepresentation of September 1974 was reasonable. The Court, although it found that Kasperek continued to ask for "bulk fuel", (App. 253-55) ruled only that he did not reasonably rely on anything said by Sgt. Kopenen in reaching or obtaining his private

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*Kasperek was apparently dropped from the rolls of Camp LeJeune during the pendency of this action below. Department of Defense Form "Absentee Wanted by the Armed Forces" (App. 50) at Box 14 thereof under the heading "Date Dropped from Rolls as a Deserter", includes the date June 21, 1976. Also, there appears in Kasperek's Service Record a complex notation: "Smn (serviceman] failed to Rpt under D800 11 May 76 Will send DD553." It appears that someone, apparently at Camp LeJeune, was under the mistaken impression that Kasperek had not reported to Captain Miller at that time, and took steps then to drop him from the rolls and report him as an absentee, even though his status then was "emergency leave" until May 17, when the District Court restrained the Appellees from issuing orders to Kasperek.

belief that the "bulk fuel," MOS involved aircraft.* The Court did not specifically rule on Kasperek's claim that the "Statement of Understanding," read together with the explanatory booklet, promised Kasperek what the Marine Corps did not here deliver, but the Court held only that, as Kasperek did not rely on any misrepresentations of fact, the misleading nature of the booklet did not matter (App. 264). It is this last ruling that appellant challenges in this court.

On July 21, 1976, Judge Curtin stayed his order of dismissal, and ordered that his prior restraining orders would continue in effect pending this appeal.

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*The testimony of Kasperek and his uncle concerning this September 1974 conversation with the recruiters is to the effect that they went up to the recruiting substation in Hamburg, New York to see about what they understood to be the "aircraft bulk fuel" [sic] specialty (App. 63-67), and that they explained what they wanted to Sgt. Kopenen and revealed their understanding of the "aircraft bulk fuel" job. They were told by Sgt. Kopenen that Kasperek would be eligible for such a job (App. 69, 72-73, 85-86). Sgt. Kopenen had at that time been a recruiter for approximately 2 months (App. 212-13). That first conversation in September 1974 is the only time that the "bulk fuel" job classification was spoken about in connection with aircraft. Although it is clear from the transcript that the "bulk fuel" specialty continued to be referred to, it may be that this connection between "bulk fuel" and "aircraft" was a private fantasy on Kasperek's part (perhaps rooted in his mind by some misunderstanding during, and Sgt. Kopenen's inexperience at the time of, the September 1974 conversation), and it seems that Sgt. Kopenen and Kasperek, by March of 1975, while continuing to make reference to "bulk fuel" were simply using the words in entirely different meaning.

POINT I

THIS COURT HAS JURISDICTION OF THIS CASE.

A. MANDAMUS AND FEDERAL QUESTION JURISDICTION.

Whether or not the District Court has jurisdiction in habeas corpus to hear this case, it clearly has jurisdiction under 28 U.S.C. §1361. In another military case this Court spoke to this problem in Lovallo v. Froehlke, supra., where, like here, petitioner claimed both habeas corpus and mandamus jurisdiction. Judge Gurfein, for the Court, stated:

> Generally speaking before the writ of mandamus may properly issue three elements must co-exist: (1) a clear right in the Plaintiff to the relief sought; (2) a plainly defined and peremptory duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available. United States ex rel Girard Trust Co. v. Helvering, 301 U.S. 540, 543-544, 57 S.Ct. 855, 81 L.Ed. 1272 (1937); 28 U.S.C. §1361.
>
> The first argument made by the Army is that appellant has sought the wrong remedy because the remedy of habeas corpus is available. It asserts that he should have reported to the Army at Fort Dix and then brought a petition for a writ of habeas corpus in New Jersey. We do not see the necessity for that involved method in a case like this. The appellant's challenge is, in essence, to "compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff' 28 U.S.C. §1361. He maintains that the Army's order is without color of authority ... . 468 F.2d 343-344.

Here, as in Lovallo, Kasperek maintained in the District Court that Respondents have no authority whatever to issue any orders to him because Respondents may no longer enforce his enlistment contract against him. The Court continued, 468 F.2d at 344:

> (3 4) This Court considred an analogous question in Schonbrun v. Commanding Officer, supra. There, a soldier who had voluntarily enlisted in the Reserve, challenged an order requiring him to report for active duty. The Court held that "whether or not habeas corpus is available, the district court was free to treat the petition as one for mandamus under 28 U.S.C. §1361" 403 F.2d at 374. See also Smith v. Resor, 406 F.2d 141 (2d Cir. 1969); Nixon v. Secretary of Navy, 422 F.2d 934 (2d Cir. 1970) (Emphasis added)

403 F.2d 371

In Schonbrun, supra,/jurisdiction under §1361 was declined because the military actions under review were sufficiently "discretionary" as to fall outside the purview of §1361. In the present case, by contrast, the action by the military is not a discretionary one, but rather a clear duty exists on the part of the respondents: If Kasperek's enlistment contract is breached, or invalid from the beginning, he must be discharged.

The third requirement for mandamus noted in Lovallo, supra, 468 F.2d at 343, that there be "no other adequate remedy available," is also met by this case. If the District Court cannot hear this claim, Kasperek will be returned to North Carolina and will presumably face AWOL charges. Although the fact of an invalid enlistment might possibly be raised as a defense in such a court martial proceeding, the witnesses necessary to support such claim are in the Western New York are and might well be, as a practical matter, unavailable to him in North Carolina. In any event, he would likely be confined in a Marine Corps jail at Camp LeJeune during the pendency of the court martial or at least confined to base. More generally, he would be restrained of his liberty for a substantial and longer period of time, as a member of

the military, than if this Court were to hear his claim. Appellee submits that therefore no other adquate remedy, such as to preclude the District Court's acceptance of jurisdiction, exists in this case.

In addition, this Court has jurisdiction under 28 U.S.C. §1331, in that the cause of action asserted by Kasperek arises under the Constitution and laws of the United States. The jurisdictional amount of $10,000, exclusive of interest and costs, is surely satisfied by the fact that Petitioner's claim seeks relief from approximately three and one-half more years of unlawful detention by the military, during which time he is reasonably likely to be incarcerated in a military prison for at least some period of time.

For jurisdiction founded under 28 U.S.C. §1331 or §1361 venue is proper in the Western District of New York under 28 U.S.C. §1391(e)(1)(2) and (4), in that one of the defendants, Captain Miller, resides in the district; in that the contract was signed in the district; and in that the Plaintiff resides in this district.

Further, Appellant respectfully suggests that the Western District was the only reasonable and convenient venue for the determination of this action. The facts seriously at issue below, and those upon which Kasperek bases his claim for relief, all occurred within this district: the representations made by the Marine recruiter in Hamburg, New York, Kasperek's reliance thereon, and the signing of the enlistment contract and rider thereto. Further, Kasperek's two witnesses (in addition to himself) reside in this district, are employed here, and would find it most inconvenient, and probably impossible, to travel to North Carolina or some other forum for litigation of this matter. The Marine recruiters

involved in this case, Sergeant Ronald Kopenen and Captain Thomas Carras are still assigned to recruiting offices in the district. The litigation of these questions was therefore most convenient for the Government in this district.

B. HABEAS CORPUS.

Two issues must be distinguished: (1) Whether Petitioner is in "custody" in the Western District of New York, and (2) whether there is a "custodian" within reach of this Court's process. Appellant submits that there is no question but that Kasperek, at the time of filing of the action, was "in custody" in the Western District of New York; the only serious question is whether a custodian is within reach of the Court's process.

First, Petitioner, who is in the Western District of New York, and before this Court, is clearly "in custody". Judge Friendly, in Schonbrun, supra, discussed the Federal Court's habeas corpus jurisdiction in cases involving military servicemen:

> The jurisdiction of the District Court to grant a writ of habeas corpus is governed by 28 U.S.C. §2241, which makes the writ available only when a Petitioner is "in custody". The statute "does not attempt to mark the boundaries of 'custody'," and courts have long recognized that "besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient *** to support the issuance of habeas corpus." Jones v. Cunningham, 371 U.S. 236, 238-240. ... The decisions make clear that Schonbrun's status as a member of the armed forces imposes such a restraint on his liberty. Jones v. Cunningham, supra, 371 U.S. at 240, 83 S.Ct. 373; U.S. ex rel Altieri v. Flint, 54 F.Supp. 889 (D.Conn. 1943) aff'd on opinion below 142 F.2d 62 (2d Cir. 1944); Hammond v. Lenfest, 398 F.2d 705, 710-712 (2d Cir. 1968); ... An inquiry into the legality of this restraint would be within the traditional function of the writ. 403 F.2d at 373 (emphasis added).

In Rudick v. Laird, 412 F.2d 16 (2d Cir. 1969), where a serviceman on leave whose commander was in California brought suit in the Southern District of New York, the court noted, "Undoubtedly, subject matter jurisdiction exists. 28 U.S.C. §2441", 412 F.2d at 20, although the petition was properly dismissed for lack of personal jurisdiction over the Respondent. See also United States ex rel Lohmeyer v. Laird, 318 F.Supp. 94, 96 (D.Md. 1970).

Secondly, Appellant submits that the actions of appellee, Captain Miller, toward Kasperek are sufficient for a finding that Captain Miller is a "custodian" within reach of the court's process. In the alternative, appellant submits that the other named appellees are "present" within its jurisdiction by reason of the activities of Captain Miller and of the Marine Recruiter, so as to allow this Court to exercise personal jurisdiction over them.

Appellant concedes that had he been on active duty in North Carolina when his father died May 5, then been granted emergency leave status to return to Western New York, and had he had no contacts with the military in the Western District, then no habeas corpus jurisdiction would exist there. Cf. Rudick v. Laird, 412 F.2d 16 (2d Cir. 1969); Schlanger v. Seamans, 401 U.S. 487 (1971).

But that situation is not this case. Here, Kasperek was confined for 10 days in the Erie County Holding Center solely because of an AWOL Detainer placed upon him by authority of Respondents herein.*

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*Clearly he was then "in custody" by authority of appellees. Shepard v. U.S. Board of Parole, Slip. Op. 5413, 5415 (2d Cir., September 7, 1976).

That detainer was lifted by Appellee Captain Miller, who resides in the Western District, at Kasperek's father's death May 5. Petitioner was further ordered by Captain Miller to report back to him, at 3 Porter Avenue, Buffalo, New York, on May 11, May 14 and May 17. Those orders were not to report to Camp LeJeune in North Carolina on a certain date, but to report to Captain Miller in Buffalo, for further decisions to be made and further orders to be given. As noted in Paragraph 8 of Counsel's Affidavit (App. 45), Captain Miller altered the final reporting date from May 14 to May 17, apparently on his own authority -- at least, he did not require consultation with anyone else, as the decision was made during a phone conversation with Counsel on May 14. Further, as recounted in Counsel's affidavit (App. 45), Captain Miller claimed and exercised the authority to decide whether to remand Petitioner to the Erie County Holding Center pending the resolution of the marijuana charge against him, and whether to arrest him and send him, under armed guard, back to Camp LeJeune, or to allow him to proceed back without such restraints.

These restraints on his liberty were directed against Petitioner by Appellee Captain Miller and his agents in this district. These orders have not merely been the carrying out of instructions issued from outside the district, but have been discretionary decisions made by Captain Miller. Petitioner submits that Captain Miller is therefore a "custodian" within the meaning of 28 U.S.C. §2241. For the government to argue that, despite all the restraints visited upon Petitioner's liberty in this district, no "custodian" exists here, is to elevate a fiction over reality.

The Marine Corps' internal bookkeeping, which would call the commanding officer of Camp LeJeune Petitioner's custodian, cannot be allowed to defeat the historic purposes of habeas corpus.

As noted above, it appears that Kasperek was dropped from the rolls of Camp LeJeune as of June 21, 1976 (App. 50). Under these circumstances, Appellees' argument below that the only proper "custodian" was the Commander of Camp LeJeune is wholly without force, in that after June 21,1976,three weeks before the hearing below, the Commander of Camp LeJeune was no longer his custodian at all. Cf. Hoover v. Kern, 466 F.2d 543 (5th Cir. 1972).

In the alternative, Appellant submits that Appellees Secretary of Defense and Commandant, United States Marine Corps are "present" in this district for the purpose of personal jurisdiction over them and are thus within reach of the Court's process.*

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*The Secretary of Defense, and the Commandant of the Marine Corps are clearly proper habeas respondents. What is necessary for habeas corpus is that "one in the chain of command" be within reach of the court's process, Schlanger v. Seamans, 401 US 487, 489 (1971). The determinative issue is whether the court has before it someone against whom its process would be effective to release the prisoner. See Ex. Parte Endo, 323 U.S. 283, 304-305 (1945); United States ex rel Lohmeyer v. Laird, 318 F.Supp. 94, 96-97 (D.Md. 1970). Of course, the Secretary of Defense and the Commandant are Kasperek's ultimate "custodians" in that they are in the chain of command and have the power to order his release from the Marine Corps. See Lohmeyer, supra., 18 F.Supp. at 98-100; Ex Parte Endo, 323 U.S. at 304-305; Burns v. Wilson, 346 U.S. 137 (1953) (respondent, Secretary of Defense); Eisentrager v. Forestal, 174 F.2d 961 (D.C. Cir. 1949), rev'd on other grounds, sub. nom Johnson v. Eisentrager, 339 U.S. 769 (1950); Cf. Shepard v. United States Board of Parole, Slip Op. 5413 (2d Cir. September 7, 1976), a habeas corpus case in which the only named respondent was the Board of Parole, where it is assumed that the Board (with the power under 18 U.S.C. §4203 to release petitioner) is the proper habeas respondent.

In Strait v. Laird, 406 U.S. 341 (1972), the Court held that the Indiana-based nominal commander of the plaintiff army reserve officer was "present" in the territorial jurisdiction of a California district court by reason of his contacts with that jurisdiction. Those contacts with the forum district included the lengthy processing of plaintiff's application for discharge as a conscientious objector by agents located in the California district (plaintiff's home). The Court held:

> The concepts of "custody" and "custodian" are sufficiently broad to allow us to say that the commanding officer in Indiana, operating through officers in California in processing petitioner's claim, is in California for the limited purposes of habeas corpus jurisdiction. 406 U.S. at 346.

The court summarized:

> That such "presence" may suffice for personal jurisdiction is well settled, McGee v. International Life Insurance Co., 355 U.S. 220; International Shoe Co. v. Washington, 326 U.S. 310, and the concept is also not a novel one as retards habeas corpus jurisdiction. In Ex parte Endo, 323 U.S. 283, 307, we said that habeas corpus may issue "if a respondent who has custody of the prisoner is within reach of the court's process ..." Strait's commanding officer is "present" in California through his contacts in that state; he is therefore "within reach" of the Federal Court in which Strait filed his Petition. Cf. Donigan v. Laird, 308 F.Supp. 449, 453; Cf. U.S. ex rel Armstrong v. Wheeler, 321 F.Supp. 471. 406 U.S. at 345 n.2.

In Hoover v. Kern, 466 F.2d 543 (5th Cir. 1972), petitioner was incarcerated in a Texas jail as a result of an Army desertion detainer laid against him. The Court, relying on Strait v. Laird, supra, found:

> that the Army's enlisting the aid and directing the activities of personnel who arrested and incarcerated Hoover in Houston is a sufficient contact to establish its presence as Hoover's "custodian" in the Southern District of Texas. 466 F.2d at 545

Rudick v. Laird, 412 F.2d 16 (2d Cir. 1969), is not to the contrary. There, petitioner was a serviceman on leave who had had no contacts whatever with the military in his foreign district, and who argued only "that his status of being in the Army amounts to being detained by the Secretary of the Army and the Secretary of Defense." 412 F.2d at 21. The Court held only that, absent any contacts, and even if the petitioner were in custody, the named defendants were not subject to personal jurisdiction. (The possibility of §1361 jurisdiction was not discussed and was apparently not raised by counsel.)

We do not argue here that the Marine Corps can be sued everywhere in the Country, a proposition rejected in Rudick, but only that where Marine Corps agents have had sufficient contacts in the Western District of New York with a serviceman, the Marine Corps is "present" within that district and subject to personal jurisdiction therein.

The "minimum contacts" doctrine, applied to Federal habeas corpus cases in Strait v. Laird, has its source in International Shoe Co. v. Washington, 326 U.S. 310 (1945). In concluding that the shoe company's dealing in the state of Washington were sufficient "minimum contacts" to subject it to suit in that state, the Supreme Court noted four different situations concerning suits against non-resident defendants: 1) where defendant's activities "have not only been continuous and systematic, but also give rise to the liabilities sued on", 2) where the defendant's continuous "operations within the state were thought so substantial and of such a nature as to justify suit

against it on causes of action arising from dealings entirely distinct from those activities," 3) where certain "single or occasional acts" of the defendant, "because of their nature and quality and circumstances of their commission, may be deemed sufficient to render the corporation liable to suit," and 4) where the casual presence of the defendant or his conduct of single or isolated items of activity, as in the forum district are not enough to subject it to suit on causes of action unconnected with the activities there." 326 U.S. at 317-18.

In distinguishing those situations, the court noted that

> The criteria by which we mark the boundary line between those activities which justify the subjection of a [defendant] to suit and those which do not, cannot be simply mechanical or quantative. ... Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws. 326 U.S. at 319.

Applying this analysis to the facts at issue, on the authority of Strait v. Laird, appellant suggests that the facts of this case, like those in Strait, fall within the third category listed. (Rudick v. Laird, supra., and Schlanger v. Seamans, 401 U.S. 487 (1971), hold only that the Army's activity does not rise to the level of the first two categories.) At issue in this case is the conduct of United States Marine Corps personnel toward a young civilian, which challenged conduct occurred in the Western District of New York. It is submitted that "the quality and nature" of these activities is such as to compel a finding that Appellees are "present" in that district by reason of these contacts.

In this case, Kasperek has had numerous and significant contacts with military personnel in the Western District of New York. The dealings with the military concerning Kasperek's AWOL detainer and the change to emergency leave status, and the subsequent orders from Captain Miller have been detailed above. Further, and by far the most significant contact between Petitioner and the military has been the acts upon which Petitioner's cause of action is based: the discussions between Petitioner and a Marine recruiter in Hamburg, New York, and the representations made by the recruiter therein, which Kasperek in this action claims were negligently made. Appellant submits that these crucial contacts between Kasperek and agents of the Marine Corps herein, are sufficient to bring this case within the rule of Strait v. Laird, supra, and to require a finding that Appellees Secretary of Defense and Commandant, United States Marine Corps, are "present" within this jurisdiction for purposes of granting relief to Petitioner.

POINT II

APPELLANT HAS NO ADMINISTRATIVE REMEDIES WHICH SHOULD BE EXHAUSTED BEFORE THIS COURT CAN HEAR THIS CASE.

The Government urged below that the District Court should not hear Kasperek's claim because he has not exhausted his administrative remedies. This contention should be rejected.

First, Kasperek's claim below was that he is not lawfully subject to military jurisdiction at all, by reason of a fraudulently induced enlistment, and by reason of the Appellees' above breach of

their contract with Kasperek. Courts have repeatedly held that where a petitioner claims that he should not be subject to military jurisdiction at all, military administrative remedies need not be exhausted before a Federal District Court will act. See Bradley v. Laird, 449 F.2d 898, 901 (10th Cir. 1971): Bent v. Laird, 453 F.2d 625 (3rd Cir. 1971). As the court put in Bent, 453 F.2d at 632:

> ... nothing in the habeas corpus statute, 28 U.S.C. §2241 et seq. suggests that the federal courts must await the exhaustion of in-service remedies to which the petitioner should never have been subjected. Compare 28 U.S.C. §2254(b). No notions of federal-state comity operate here.

Simply put, Kasperek should not be subject to a requirement that he exhaust military remedies when he should not be subject to military jurisdiction at all.

Even if the rule established in Bradley, supra, and Bent, supra, does not apply here, a traditional analysis of the exhaustion requirement points to the conclusion that the rule of exhaustion should not be imposed here.

It is well settled that the doctrine of exhaustion must not be applied rigidly and mechanically, but must be applied in each case with an "understanding of its purposes and of the particular administrative scheme involved." McKart v. United States, 395 U.S. 185, 193; and that:

> The contention that the rigors of the exhaustion doctrine should be relaxed is not to be met by mechanical recitation of the broad interests usually served by the doctrine, but rather should be assessed in light of a discreet analysis of the particular default in question, to see whether there is a "governmental interest compelling enough" to justify the forfeiting of judicial review. McGee v. United States, 402 U.S. 479.

The basic purposes of the exhaustion rule are: (1), avoidance of premature interruption of the administrative process, (2), provision for the agency to apply its expertise and to develop a factual record, and (3), maintenance of judicial efficiency by elimination of as many complaints as may be through the administrative process prior to judicial review. McKart, supra, 395 U.S. at 193-95. These purposes will be discussed in turn as they apply to the instant case.

First, there is no clearly provided process to which Petitioner can turn for an administrative remedy, or one which would be interrupted by the Court's consideration of Kasperek's claim. 10 U.S.C. §1552 provides that the secretary of each military department may "correct any military record ... to correct an error or remove an injustice," upon the recommendation of a board established by him. While the grant of power is apparently very broad, there is no clear indication that the board has power to consider a claim of discharge on the grounds of fraudulently induced enlistment.

In U.S. ex rel Brooks v. Clifford, 412 F.2d 1137 (4th Cir. 1969), the Court observed:

> Although we do not decide the question, it is at least arguable that a military board for correction of records established under 10 U.S.C. §1552 does not have jurisdiction to grant relief in an appropriate case; the differing interpretations of the Army and Navy are witness to the fact. The legislative history of §1552, as well as the provisions of the statute, indicate that the basis purpose of the statute was to relieve Congress from consideration of private bills to correct injustices, usually of the type involving an appropriation of money -- subjects far different from the adjudication of a claim of conscientious objection. It has been held that §1552 was not intended to affect judicial jurisdiction. Nelson v. Miller, 373 F.2d 474, 479 (3d Cir. 1967); Ogdon v. Zuckert, 298 F.2d 312, 314 (D.C. Cir. 1961).

> Even if the legislative intent is determined not to foreclose exercise of this type of jurisdiction under the broad mandate to "correct an error or remove an injustice," the Board for Correction is not presumed to have any particular expertise in conscientious objection matters, nor would its decision involve the exercise of discretion. While the Army Board of Correction of Military Records, established under 32 C.F.R. §581.3, promulgated pursuant to the statute, may grant a hearing in which event the applicant has the right to produce witnesses if he can arrange for their appearance at the time and place set for the hearing, the Board is composed of civilian officers or employees of the Department of the Army. ...In short, we conclude that no injury whatever is done to the Army's administrative apparatus by our sanction of judicial review in the instant case. 412 F.2d at 1139-40.

Thus, it is hardly clear that there is any adequate remedy available to Kasperek under 10 U.S.C. §1552.

Craycroft v. Ferrall, 408 F.2d 587 (9th Cir. 1969), which was the leading case to hold that a district court should stay its hand pending review of a Habeas Corpus application by the Board for correction of military records, was vacated by the Supreme Court on the Solicitor General's concession that the administrative remedies including the Board review, required by the Court of Appeals below, "have either been exhausted or are non-existent." 397 U.S. 335. As the Court put it in Parisi v. Davidson, 405 U.S. 34, 38 n.3 (1972): "Current governmental policy rejects Craycroft." It would seem that this concession would preclude any serious claim that resort to the Board for Correction of Military Records is a prerequisite to jurisdiction.

As Judge Lasker put it in Williams v. Froehlke, 356 F.2d 591 (S.D.N.Y. 1973):

> Although the Court of Appeals in this circuit has not considered the question, many courts have held, in a variety of contexts, that application to the Army Board for Correction of Military Records pursuant to 10 U.S.C. §1552, is not a prerequisite to requesting relief in Federal Court. As Judge Oakes, sitting by designation, stated in U.S. ex rel Joy v. Resor, 342 F.Supp. 70, 72 (D.Vt. 1972), "resort to the Army Board for Correction of Military Records is not an administrative remedy which must be exhausted" and "in light of the present state of the law, and the legislative history of 10 U.S.C. §1552, it is unlikely that the second circuit would today require application to the Army Board for Correction of Military Records before judicial action could be taken." 356 F.Supp. at 592-93.

Secondly, there is no question of agency expertise involved here. Kasperek's claim below did not involve anything that happened within the military, but rather involves what occurred between a military agent and a young civilian. Surely, the military has no special expertise in determining what happened in this civilian-military interface to which the Federal Courts need defer. Nor is there any particular need for a prior fact finding or screening agent to develop a record for the Court's review. Nor has the military any greater expertise than the courts in interpreting contract law. It is thus not clear how a Court's ultimate resolution of this issue would be aided by a prior administrative record. See Brooks, supra.

As there is no question of administrative expertise here, and no clearly prescribed procedure, there is no perceivable interest on the part of the agency which would require this Court to avoid impinging upon the interests of an administrative system by adjudicating this claim. Here there are no clearly defined procedures for the presentation and processing of such claims as Kasperek's. This case is thus unlike the

elaborate procedures provided for the processing of conscientious objector or hardship claims within the Selective Service System, or for claims for discharge from the military on such grounds. In those cases, a clearly defined procedure functions to build a record that is of some use to a reviewing court, and the preliminary determinations of fact are explicitly committed by regulation to the agency. Under those circumstances, the courts have generally insisted that prior resort to the administrative procedure is a precondition to review by a court. Here, in the absence of any clearly prescribed procedure, and where the factual issues are much simpler than the very delicate, complex and often litigated issue of whether an individual is a conscientious objector, there are no similar interests to be protected by a court's requiring prior exhaustion.

The third complex of interests served by the exhaustion requirement is of those interests relating to judicial efficiency: most basically, the prior resort to an administrative remedy may keep the case out of court altogether. Certainly it is at least remotely possible that Kasperek might ultimately prevail before the Board for Correction of Military Records, and be discharged, and this case might then never reach a Federal District Court. But this mere possibility, it is submitted, should not be sufficient to cause this Court to stay its hand. Where it is not clear that there is in fact a speedy and adequate administrative remedy, the mere possibility that this case might be mooted by the military's action should not under the circumstances be sufficient to require prior

exhaustion which might very well be futile.*

Against the relatively minimal interests to be served by a requirement that Kasperek attempt to exhaust whatever administrative remedies are available to him, as unclear and uncertain as they are, there must be balanced the considerable hardship and trauma attendant upon requiring such exhaustion. If the District Court had declined to act, Kasperek would have been returned to Camp LeJeune and there presumably held in confinement pending court martial. He thus would be subjected to a further period of time in the military control which he here claims is unlawful, and would be further required to undergo the uncertainties and hardships of court martial proceedings against him; and his mother's plight, already very difficult in light of her husband's death of cancer May 5, would have been further exacerbated by the enforced absence of, and military proceedings against, her only child. Appellant submits that under these circumstances there is no "governmental interest compelling enough" to justify the forfeiting of prompt judicial review. McGee, supra, 402 U.S. at 485.

In Hayes v. Secretary of Defense, 515 F.2d 668, 674-75 (D.C. Cir. 1975), the court held:

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*In Hayes v. Secretary of Defense, 515 F.2d 668, 675 n.32 (D.C. Cir. 1975), the court noted that proceedings before the Board for Correction of Military Records could take as long as five months. In Brooks, supra, the time was stated to be approximately four months.

> Appellant here, however, seeks to obtain discharge from his confinement within the Army. The delay attendant upon a petition to the Board for Correction of Military Records would significantly increase the length of his involuntary service without judicial review. Indeed, Appellant's case would likely be mooted altogether. In such a situation, where time is of the essence, strong justification must be found to require resort to an administrative remedy over and above the regular discharge procedure. We find no such justification here. (emphasis added.)*

The other cases cited by the Government below are not to the contrary. Bard v. Seamans, 507 F.2d 765 (10th Cir. 1974) and Champagne v. Schlesinger, 506 F.2d 979 (7th Cir. 1974), are post-discharge actions brought to correct the discharge issued to Plaintiffs. (In Bard the action was brought 10 years after the discharge complained of.) Such claims are clearly within the mainline jurisdiction of the Board for Correction of Military Records, and equally clearly, no emergency situation existed to alter the usual balance in favor of imposing the exhaustion rule. The Champagne court specifically considered the issue of potential harm to Plaintiffs in determining whether to apply the exhaustion doctrine:

> Plaintiffs have already been discharged, so they cannot be spared this trauma even by an immediate favorable decision on the merits by this Court. If Plaintiffs resort to the BCMR and if the BCMR decides in Plaintiffs' favor and the Secretary of the Navy follows the BCMR's recommendation, Plaintiffs can be fully reinstated and awarded back pay. Should Plaintiffs be unsuccessful before the BCMR, they can return to the Federal Courts to have their claim adjudicated ... the harm that would be caused by a decision of this Court ordering exhaustion is, therefore, minimal. 506 F.2d at 984.

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*In Hayes, the petitioner had exhausted one administrative remedy specifically provided for the particular enlistment contract he had signed, which provided that his contract was voidable upon his failure to receive clearance after an investigation. In Kasperek's case, no similar situation exists, as there is no administrative remedy to petitioner's claim that his contract of enlistment was void ab initio.

The present case is very different. If Kasperek had been denied the aid of District Court and required to repair to the Board for Correction of Military Records, he would have been reordered and returned to Camp LeJeune, North Carolina where he will likely face a court martial. If this Court holds that this hearing on the merits was improper for this court, the same will occur. Even if he is ultimately successful before the Board, presumably after months of waiting out the Board's procedure,* he will have suffered the irreparable harm of additional months as a member of the military and of likely incarceration.

The Court in Champagne also noted that requiring exhaustion would "give the Navy the opportunity to adapt a narrowing construction of its regulations" thus avoiding unnecessary judicial decision of Constitutional questions. 506 F.2d at 984. (Turning on the same considerations is Hodges v. Callaway, 499 F.2d 417, 422 (5th Cir. 1974).) Here, there is no military regulation to be interpreted, or any question requiring any particular military expertise. The decisive issue in this case is not a military question, but rather, a question involving the relationship of military authority to the civilian population. In this matter, this Court need not bow to any supposed military expertise.

Seepe v. Department of the Navy, 518 F.2d 760 (6th Cir. 1975), is the only case known to counsel that holds that, where a plaintiff presently in military control seeks relief, a Federal Court must stay its hand because plaintiff has not petitioned the Board for Correction of

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*An application to the Board for Correction of Military Records does not stay any other proceeding against the Applicant. 32 C.F.R. §723.3(d).

Military Records. We submit that, for the reasons argued above, Seepe is wrongly recited insofar as it finds that the hardships attending upon a delay of this judicial review and an application to the Board, do not outweigh the interests served by the exhaustion requirement. In any event, Seepe would not require a dismissal of the petition/complaint herein, but would lead to the District Court staying Kasperek's orders pending exhaustion of administrative remedies. 518 F.2d at 765. Cf. Ogden v. Zuckert, 298 F.2d 312, 317 (D.C. Cir. 1961); Hayes v. Secretary of Defense, 515 F.2d 668, 675 (D.C. Cir. 1975).

A dismissal of this case pending proceedings in Board for Correction of Military Records would be particularly inappropriate for an appellate court, after the facts had been set forth in a hearing in the District Court. As the Court held in Brooks, supra., the Court

> could retain jurisdiction and stay all proceedings in his application now to the Army Board. Conceivably, such an application could result in the granting of his request. But for this petitioner, judicial efficiency would not thereby be promoted... 412 F.2d at 1141.

The Government's brief below cites no case in support of its assertion that the Complaint procedure of 10 U.S.C. §938 is an adequate administrative remedy and therefore a prerequisite for this Court's expertise of its jurisdiction, nor is counsel aware of any such case. Appellant submits that this section, which in terms aids a serviceman who believes himself wronged by his commanding officer, applies only to the relationship of commander and commanded within the military, and has no application to the instant claim that private Kasperek is not lawfully subject to military jurisdiction at all.

Gusik v. Schilder, 340 U.S. 128 (1950), and Noyd v. Bond, 395 U.S. 683 (1969), cited by the Appellee below, both involved servicemen who attempted to invoke the Federal Court's supervision over court martial proceedings before those proceedings had run their course. Such an intervention would have obliged the Federal Courts "to interpret extremely technical provisions of the Uniform Code which have no analogs in civilian jurisprudence, and which have not even been fully explored by the Court military appeals itself." 395 U.S. at 689. In both cases, no claim was made that the military had no lawful jurisdiction whatever over the petitioner.

The present case is quite different. No military regulations are involved and no peculiarly military matters are sought to be litigated. The claim here is that the military has no lawful jurisdiction over Petitioner, and that claim turns on the transactions between military agents and Petitioner, then an 18 year old civilian, clearly a matter within the particular competence of the civilian's Federal Court.

Parisi v. Davidson, 405 U.S. 34 (1972), also cited by the Appellees below, favors Kasperek's habeas corpus review of denial of his application for discharge as a conscientious objector. After that denial, court martial charges were instituted against Parisi for refusal to obey an order to board a plane bound for Viet Nam. The Supreme Court held that it was error to stay the habeas corpus proceeding pending final decision by the court martial. Justice Stewart said, 405 U.S. at 41-42:

> Under accepted principles of comity, the Court should stay its hand only if the relief the Petitioner seeks ... would also be available to him with reasonable promptness and certainty through the military judicial system in its processing of the court martial charge.

The court framed the issue, 405 U.S. at 40-41:

> But the issue in this case does not concern a federal district court's direct intervention in the case arising in the military court system. Cf. Gusik v. Schilder, 340 U.S. 128; Noyd v. Bond, 395 U.S. 683. The Petitioner's application for an administrative discharge -- upon which the habeas corpus Petition was based -- antedated and was independent of the military criminal proceedings.
>
> The question here, therefore, is whether a Federal Court should postpone adjudication of an independent civil law suit clearly within its original jurisdiction.

The Court then went on to consider whether the Military remedy argued by the Government was promptly and certainly available, and concluded that the remedy, like the one advanced by the Government in the case of Kasperek, was at best a doubtful one.

The lesson of Parisi for this case seems clear: This court should not postpone adjudication of an independent civil lawsuit clearly within its original jurisdiction, in order to allow military matters to run their course.

In any event, Appellees in this case are hardly in a position to invoke Kasperek's purported failure to use available administrative remedies. Kasperek testified below that, when he complained about being assigned to the wrong job, his complaints were given short shrift, he was twice cursed at, and no one mentioned to him any avenue of regress whatever, nor did anyone suggest to him the possible availability of redress under Article 138 or the Board for Correction of Military Records. (App. 101-102, 103-106). The Government should not be permitted to

demand that Kasperek now resort to these remedies, when months ago, when Kasperek approached military agents with his complaint, he was told there was no remedy.

POINT III

APPELLANT IS ENTITLED TO RELIEF FROM HIS ENLISTMENT CONTRACT.

It is well settled that, absent a supervening statute, an enlistment contract is governed by general principles of contract law. Bemis v. Whalen, 341 F.Supp. 1289, 1291 (S.D.Cal. 1972); In Re Grimley, 137 U.S. 147 (1890); Bell v. United States, 366 U.S. 393 (1960); U.S. ex rel Hirshberg v. Malanophy, 168 F.2d 503, 506 (2d Cir. 1948), rev'd on other grounds, 326 U.S. 210 (1949); Shelton v. Brunson, 465 F.2d 144 (5th Cir. 1972).

Here, the two writings unmistakably promise Kasperek that he will be assigned one of the jobs within the "mechanical/electrical" subprogram; put another way, they promise him that he has the chance to be selected for the job he had been asking about, the "bulk fuel" specialty. But, as Judge Curtin found, he could not have been so selected,* despite his and Sgt. Kopenen's belief to the contrary. Appellant submits that the denial of this opportunity to be chosen for

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*Although the point was not explored below, it may be that the bulk fuel MOS was previously within the "mechanical/electrical" subprogram but has been removed from it. In the cross examination of Capt. Carras, the following exchange took place:

Q. And apparently in the book bulk fuel is in fact within construction equipment and shore party and therefore in fact within the mechanical/electrical?

A. No, this book is old. This book was used back in '74 and '75. (Aff. 228)

this job vitiates the contract and entitles Kasperek to rescission and discharge.

In Crane v. Colemen, 389 F.Supp. 22, 24 (E.D.Pa. 1975), the Court held:

> For petitioner to be entitled to rescission of this contract we must find that he "has suffered a breach so material and substantial in nature that it affects the very essence of the contract and serves to defeat the object of the parties." Matzelle v. Pratt, 332 F.Supp. 1010, 1012 (E.D.Pa. 1971).

Accord, Bemis v. Whelan, supra.; Wong v. Laird, SSLR 3650 (M.D.Cal. 1971). See also 13 Williston, Contracts §1544.

Where the record is clear that Kasperek wanted "bulk fuel" (even though he may have misunderstood whether he was supposed to get a guarantee of a particular job or only of a range of jobs, and even though he may have somewhat misapprehended the exact content of that job), Appellant submits that the opportunity to be chosen, in the luck of the draw or the random selection of the computer, was the essence of the contract for Kasperek, and the breach of that contract by the Marine Corps entitles him to rescission.

That Kasperek misunderstood the exact nature of the job he was referring to by his use of the words "bulk fuel" does not change this analysis. It is hornbook contract law that the subjective intent of the parties is irrelevant to the formation of a contract, and that only the external expressions of assent would create a contractual obligation. 13 Williston, Contracts (3rd Edition 1961) §1536.

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by 20 bishops that either party, when it used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of this sort. Hotchkiss v. National City Bank, 200 F. 287 (S.D.N.Y.) aff'd 231 U.S. 50.

Kasperek's private fantasy about aircraft, which Judge Curtin held to be not a reasonable reliance on statements of Appellees or their agents, is irrelevant to this contract claim. Only that he was seeking an opportunity to be assigned to the "bulk fuel" specialty, and that the written documents here promised him that chance, are to the point. If a produce merchant were to order a carload of, say, apples, but at the signing of the contract, due to inattention, unfamiliarity with the language, or private hallucination, he believed that he was ordering a carload of potatoes -- is there any doubt that this merchant could enforce that contract for the delivery of apples?* In his opinion, Judge Curtin commented:

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*"Finally, where there has been an integration of the agreement, those who executed it will not be allowed to place their own interpretation on what it means or what it is intended to mean. The test in such a case is objective and not subjective. ...'It follows that the test of a true interpretation of an offer or acceptance is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.'" Williston, id., at page 17. Here Captain Carras admitted below that from the two documents at issue here, "it might reasonably appear to someone that bulk fuel was in fact within mechanical/electrical." (App. 229)

> It is important in our affairs and we recognize it in the law that writing means something. When you put your John Hancock on a paper, it means something. It is no excuse to say that the person is not a reader. (Aff. 264)

The court held, in effect, that Kasperek was entitled to no more than the papers promised him; it is submitted that he is, equally importantly, entitled to no less.

CONCLUSION

For the above reasons, the judgment below should be reversed and the case remanded with instructions to order Kasperek discharged from the Marine Corps.

DATED: September 24, 1976

Respectfully submitted,

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CERTIFICATE OF SERVICE

KASPEREK VS RUMSFELD, ET AL Docket No. 76-2090

THIS IS TO CERTIFY that I have this day mailed two copies of the enclosed Brief to Edward J. Wagner, Assistant United States Attorney, 502 U.S. Courthouse, Buffalo, New York 14202, and that I personally delivered one copy of the enclosed appendix to Mr. Wagner's office on Friday, September 24, 1976. After I had been informed by the printer that the Brief would not be duplicated in time to serve a copy on Mr. Wagner, I also delivered to his office a typescript of the Brief.

Robert C Macek

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Buffalo, New York
September 25, 1976
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